United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,597

United States of America

v.

Barrington Williams,

Appellant

APPELLANT'S BRIEF

Edward L. Merrigan
Smathers, Merrigan & O'Keefe
Court Appointed Counsel for Appellant
1700 Pennsylvania Ave.
Washington, D.C. 20006
Tel: 293-5300

February 12, 1970

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Preliminary Statement

Appellant, Barrington Williams, was indicted in September, 1968 by a Grand Jury sitting here in the District of Columbia. The indictment contained two counts charging appellant with violations of Title 26 United States Code 4704(a) and Title 21 United States Code 174. Count One charged that on or about August 14, 1968, appellant "purchased, dispensed and distributed not in the original stamped package and not from the original stamped package, a narcotic drug, that is, 99 capsules containing...heroin". Count Two asserted that on or about August 14, 1968, appellant "received, concealed and facilitated the concealment of a narcotic drug, that is, 99 capsules...of heroin.,.after said heroin...had been

imported into the United States contrary to law, with the knowledge of Barrington Williams...". The second count of the indictment states that the heroin referred to in that count is the same heroin referred to in the first count of the indictment.

On June 18, 1969, the District Court (Judge Pratt) denied appellant's motion to dismiss the indictment or, in the alternative, to suppress as evidence the capsules seized by the arresting officers from Williams on August 14, 1968 when he was taken into custody.

The case thereupon proceeded to trial before Judge Pratt and a jury, at the conclusion of which the jury ultimately rendered a verdict of guilty on both counts.[1]

On September 5, 1969, Judge Pratt sentenced appellant to a term of 10 years on each of the two counts, such terms to be served concurrently (Tr.238). Judge Pratt thereupon stated to counsel for appellant (Tr.238):

1/After about an hour and a half of deliberation, the jury sent the Court a note asking if it could possibly find appellant "guilty on one count only". The Court wrote "Yes" on the note and sent it back to the jury, which thereafter nevertheless found appellant guilty on both counts. (Tr.p.231;234).

"I very much hope that you will take (an) appeal, Mr. Merrigan."

A notice of appeal was thereupon filed and this case is before this Court under the provisions of Title 28 United States Code §1291.

Statement of Issues

This appeal accordingly presents the following issues for determination:

1. Whether the District Court erred by denying appellant's motion to suppress the capsules seized from appellant's person by arresting officers under circumstances wherein appellant was originally arrested solely because he was caught by the police trespassing in a condemned apartment building, whereupon the police proceeded to search his clothing and seize the capsules without a warrant and without probable cause to arrest him for violating the narcotics tax provisions of the Internal Revenue Code (26 U.S.C. 4704(a)) or the narcotics importation provisions of 21 U.S.C. 174. Stated another way, did the officers violate appellant's rights under the Fourth Amendment when they proceeded to search his person and to seize the capsules without a warrant and without probable cause to arrest appellant for any violation of either 26 U.S.C. 4704(a) or 21 U.S.C. 174.

2. Whether appellant's rights against self-incrimination under the Fifth Amendment were violated by his conviction under Count One of the indictment which charges that appellant "purchased, dispensed and distributed not in the stamped package and not from the original stamped package a narcotic drug" when, as a matter of law, the Courts have recognized that to have obtained stamps and paid the tax on narcotic drugs would have required appellant to incriminate himself.

3. Whether appellant's rights under the Fifth and Sixth Amendments were utterly destroyed when he was convicted of violating 26 U.S.C. 4704(a) which makes it a crime "to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from (such) package" on the basis of a record which is completely devoid of any evidence whatsoever that appellant either "purchased", "sold", "dispensed" or "distributed" any narcotic drug -- the case against appellant being based exclusively on the statutory "presumption" or "inference" that "the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found".

A sub-issue is whether in the instant case, the utilization of this presumption alone to convict appellant

was especially unconstitutional because all of the arresting officers readily testified that (i) they never even bothered to ask appellant whether he had actually paid the tax involved or to produce the required tax stamp (ii) in any event, as officers not attached to a Narcotics Squad, they were not familiar with what type of tax stamp or proof of payment of the said tax was actually required by appellant.

4. Whether appellant's rights under the Fifth and Sixth Amendments were likewise destroyed when he was convicted of violating 21 U.S.C. 174 which makes it a crime to traffic in heroin or to import heroin into the United States on the basis of a record which is absolutely devoid of any evidence whatsoever that appellant "fraudulently or knowingly imported or brought any narcotic drug into the United States..." or that appellant "received, concealed, bought, sold...or facilitated the transportation, concealment or sale ofany such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law"-- the case against appellant being based entirely and completely on the statutory "presumption" or "inference" that "possession shall be deemed sufficient evidence to authorize conviction".

A further sub-issue in this case, is whether application

of this presumption alone to convict appellant was particularly wrong when (i) the arresting officers themselves actually testified that, at the time of arrest and when they seized the capsules from appellant they were completely unable to determine whether said capsules contained heroin or any other narcotic drug; that by looking at same, one could only describe the capsule contents as "white powder"; (ii) the arresting officers and the Government itself conceded that no one can determine by mere "possession" of the capsules that same contain a narcotic drug, much less an "imported" narcotic drug; that a determination of the presence of heroin can be made only after expert chemical analysis; and finally that it is <u>impossible</u>, even by chemical analysis of a narcotic, to determine whether it is domestically produced or imported; and (iii) the Government's own expert witness readily conceded that heroin is a derivative of morphine; that morphine is produced in large quantities here in the United States by numerous drug manufacturers; and that once a clandestine manufacturer is possessed of morphine, he can readily produce heroin here in the United States as well as abroad.

5. Whether appellant's rights were further grossly prejudiced by the young prosecutor's statement to the jury in his rebuttal closing argument (without any evidence of any kind in the trial record to support the said statement) that (Tr.211):

"Assume for the moment that he (appellant) did purchase it-- just assume it-- I don't want you to assume it when you go to the jury room, but just for the moment assume he purchased it. Assume further that he's a narcotic addict. You have to assume one thing or another for the moment, he's either a narcotics addict or a narcotics pusher..."

(Emphasis supplied)

A further sub-issue here is whether the Court erred by refusing to grant appellant's motion for a mistrial made immediately after the said statement was made to the jury totally without any support in the evidence.

6. Whether Title 26 U.S.C. 7237 violates appellant's rights under the 8th Amendment to the Constitution to the extent that it absolutely requires the Court in a case of this nature to give appellant a minimum term of 10 years imprisonment and utterly deprivesthe Court of its discretion, regardless of the circumstances, to suspend sentence or reduce the sentence or grant probation.

In accordance with Rule 8(d), counsel certifies that this case has not previously been before this Court under the same or any similar title.

References and Rulings

The only rule of any significance in this case is Judge Pratt's informal decision set forth in the Transcript (Tr.86-89) which denied appellant's motion to suppress. There are no other opinions, memoranda, findings and conclusions or other

written rulings which the District Court set forth as the basis of the judgment presented for review to this Court.

Statement Of The Case

Approximately one week prior to August 14, 1968, Officers Shaffer and Campbell of the District of Columbia Police Department were on foot patrol in the vicinity of a vacant, condemned building located at 1929 14th Street, N.W. here in the District of Columbia (Tr. 15,16;51). A man in charge of the building came out of the restaurant which was still operating on the ground floor of the dilapidated building and asked them if they would periodically check the building (Tr.17). He complained that "drunks" had been using the building at night and he was afraid they might start a fire (Tr.17). The building had signs on it which stated it was "Condemned Property", but there was no sign directing persons not to trespass (Tr.17;59). In fact, as stated, a commercial restaurant was still in operation on the ground floor.

In response to the aforementioned request, during the next week Officers Shaffer and Campbell "checked the building at different intervals to see if anybody was in there" but until August 14 did not find anyone on the abandoned floors of the building and they made no arrests (Tr.17;57). The officers testified, however, that it was their intention to arrest anyone who was caught trespassing in the condemned building (Tr.17).

They repeatedly emphasized that the sole purpose of their visits to the building was "to keep all unauthorized personnel out of the building" (Tr.17). At the preliminary hearing on the motion to suppress, Officer Shaffer testified as follows (Tr.18):

> "Q. Did you have any specific instructions from any of your superiors in the Police Department to make any arrests in that building?
>
> "A. No, I didn't need it.
>
> "Q. Had you applied for or obtained a warrant to arrest anybody in that particular building?
>
> "A. No, sir.
>
> "Q. Had you applied for or obtained a warrant to search anybody in that building prior to August 14, 1968?
>
> "A. No, sir.
>
> "Q. Prior to August 14, 1968, and indeed prior to the very time of the arrest in this case, did you know the defendant, Barrington Williams?
>
> "A. No, sir.
>
> "Q. Did you know Mr. Williams by name or reputation at the time you arrested him?
>
> "A. No, sir."

In any event, on August 14, 1968, Officers Shaffer and Campbell entered the said building at approximately 2 o'clock in the afternoon "to check the building to see if anybody was in it" (Tr. 19). They entered at the rear of the building and started checking floor by floor from the ground floor to the top floor (Tr. 21). When they reached the fourth floor, they heard the voices of two men directly above their heads on the

fifth floor (Tr. 21). They thus proceeded to that floor where they found and arrested the two men, both of whom were possessed of narcotics paraphenalia (Tr. 22).

As the officers were searching those two men, appellant Williams "came running up the steps" to the fifth floor of the building (Tr. 22). Officer Shaffer, with pistol drawn, turned and faced Williams (Tr. 46,47). Williams himself abruptly turned and "went back downstairs" (Tr. 22). Officer Campbell, with pistol drawn, followed and apprehended Williams on the fourth floor of the building (Tr. 22;57). Williams thereupon returned to the fifth floor, where he was asked why he was in the building (Tr. 23).[2] Officer Shaffer testified that, at that point, he "noticed a bulge in Williams' left front (pants) pocket" (Tr. 23;54). He "patted" the bulge "to see if he had a gun" (Tr. 23). He found, however, that the bulge in Williams' pocket was "something soft" (Tr. 23). The officer thereupon put his hand in Williams' pocket and pulled out a small bag about 2 or 3 inches in size which contained "99 capsules of a white powder" (Tr. 23; 54).

2/The officers actually originally asked Williams simply if he had "permission" to be in the building (Tr.59). Williams replied that "he was supposed to meet some man there" (Tr.60). In other words, up to that point, the sole reason for his detention was the potential trespass charge.

More specifically, regarding this search of Williams' person, Officer Shaffer testified as follows (Tr.23,24):

> "Q. Now officer, did the defendant have a gun on his person when you arrested him?
>
> "A. No....
>
> "Q. Was there any weapon in the pocket that you searched?
>
> "A. Just that bag....
>
> "Q. And until you actually put your hand into the defendant's pocket, you had no reason to believe that he actually possessed narcotics...?
>
> "A. No...."

The officers testified further that neither of the first two men apprehended in the building on August 14, 1968 were charged with either possession of narcotics or with violations of 26 U.S.C. 4704(a) or 21 U.S.C. 174, although the officers made it plain in their testimony that both were believed to be in the act of using narcotics when apprehended (Tr. 36,37). The charge against those two was limited to "possession of implements of crime" -- a relatively minor offense under the laws of the District of Columbia (Tr. 37).

The officers also made it perfectly clear, in response to questions put to them by Judge Pratt, that appellant Williams was actually placed under detention or arrest on the fourth floor of the condemned building when he was first apprehended by Officer Campbell, (Tr. 63). At the time of arrest, the officers' sole

reason for detaining Williams was his mere presence in the building itself. At best, he was chargeable with trespassing or unlawful entry, both of which are mere misdemeanors in the District of Columbia. Neither officer knew him; the sole cause for their being in the building was to arrest trespassers; and neither had reasonable or probable cause to believe that Williams was in violation of either Title 26 U.S.C. 4704(a) or 21 U.S.C. 174. The latter charges stemmed exclusively from the subsequent unlawful search of Williams person, a search made without a warrant and in violation of his rights under the Fourth Amendment to the Constitution of the United States.

Clearly, therefore, Judge Pratt erred when he denied appellant's motion to suppress as evidence against Mr. Williams the capsules seized from his person in violation of his constitutional right to be free from unlawful search and seizure made without a warrant and without any probable cause whatsoever.

As indicated above, Williams' rights under both the Fifth and Sixth Amendments to the Constitution were likewise violated when the District Court permitted him to be convicted under both 26 U.S.C. 4704(a) and 21 U.S.C. 174 solely on the basis of "statutory presumptions" or "statutory inferences of guilt" stemming from his mere "possession" of the capsules which had been seized by the arresting officers under the circumstances described above. The Government rested its case

under both 26 U.S.C. 4704(a) and 21 U.S.C. 174 after proving simply that Williams was apprehended with "99 capsules of white powder" in his possession; that said powder, upon later detailed chemical analysis, contained a percentage of heroin; and that no tax stamps were found on the envelope which held the capsules when the officers took them from appellant's person. In the words of the Government's closing argument to the Jury (Tr.194,195) -

> "Those are the facts...They are not very elaborate, as we have said time and time again...
>
> "And you will hear from His Honor, ladies and gentlemen, that the law provides that there is an inference that a person who is in possession of narcotics...that that person is in violation of the law. There is an inference built right into it."

Thus, while 26 U.S.C. 4704(a) defines the crime charged against appellant to be the purchase, sale, dispensing or distribution of narcotic drugs, there is not one iota of evidence in the record in this case that appellant did any of those acts. When he was detained by the arresting officers, the capsules were securely enclosed in an envelope in his pocket. There is no evidence that he actually purchased the capsules from someone else; or that he sold or sought to sell same to other persons; or that he did anything to indicate that he was engaged in the distribution of the said capsules. The Government's entire case, under 4704(a) is that Williams "possessed" the said capsules and "seemingly" or "apparently" there were no taxpaid stamps to cover the seized capsules.

Whatever might be said about the constitutionality of sending a defendant to prison for 10 years on the basis of such a "presumption" or "inference" in other cases, clearly it was grossly improper to base the conviction in this instance on such a flimsy showing completely devoid of any proof of either the crime specified by Congress in Section 4704(a) of the Internal Revenue Code or of the statutory presumption itself. Here, both arresting officers openly testified that they never even bothered to ask Williams at the time of his arrest or thereafter to investigate to determine whether, in fact, he had ever obtained or sought to obtain "tax paid internal revenue stamps" for the capsules he possessed. Officer Shaffer, one of the officers, testified (Tr. 127):

> "Q. You testified, officer, that you did not obtain a tax stamp from the defendant Williams, is that correct?
>
> "A. He didn't show me any.
>
> "Q. Did you ask him for one?
>
> "A. No, sir.
>
> "Q. Have you ever asked the defendant Williams to exhibit a tax stamp with reference to that envelope which has been marked as Defendant's Exhibit No. 1 for identification?
>
> "The Court: Government's Exhibit 1 for identification.
>
> "The Witness: No, I didn't ask him.
>
> "Mr. Merrigan: You have never done that to this day?

"The Witness: No, sir."

Indeed, Officer Shaffer testified that he had never even seen the requisite type of tax stamp before, and that he "wouldn't know what they looked like" if he actually saw one (Tr.128).

The other arresting officer, Officer Campbell, likewise testified that the only time he had ever seen a federal tax stamp before was "quite a while ago when I was in school" (Tr. 140). He was not sure whether the stamp he saw so long ago was a narcotics taxpaid stamp or some other type of stamp (Tr.140). Like Officer Shaffer, he thereupon proceeded to testify as follows:

> "Q. Did you ask the defendant, Barrington Williams, for a tax stamp that day when you arrested him?
>
> "A. No sir, I did not.
>
> "Q. Did you insist that he produce a tax stamp that day when you arrested him?
>
> "A. No, sir.
>
> "Q. Was there any discussion at all with Barrington Williams regarding a tax stamp that day?
>
> "A. No, sir."

The evidence before the Court also shows that when appellant was taken to the 13th Precinct to be booked, the two arresting officers, who were not assigned to narcotics work, called Officer Parker, a Narcotics Investigator for the Metropolitan Police Department, to come to the Precinct to meet

with the appellant and to analyze the white powder seized from Williams' person as aforesaid. He saw the appellant and spoke to him (Tr. 149); he took the envelope and capsules from the arresting officers, but again he completely failed to establish that, in truth and in fact, Williams had failed to obtain the taxpaid stamps required by Section 4704(a) (Tr. 156,157). He testified simply that he never even asked Williams to produce any such stamps (Tr. 156).

Faced with this state of the record, counsel for the Government made the following candid admission in his closing argument to the jury (Tr. 212):

> "Ladies and gentlemen, you heard the testimony from the police officers with regard to the question of whether or not there was a tax stamp. They told you there was not. <u>They told you the question of a tax stamp never was brought up</u>."
>
> (Emphasis supplied)

Of course, the "presumption" or "inference" in 26 U.S.C. 4704(a) upon which the Government relies in this case to establish appellant's guilt of the crime of "purchasing, selling, dispensing or distributing narcotic drugs" specifically reads as follows:

> "...<u>the absence of appropriate taxpaid stamps</u> from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found."
>
> (Emphasis added)

Appellant contends, therefore, that the record before the Court shows conclusively that the Government utterly failed not only to prove the essential elements of the crime involved under Section 4704(a) (purchase, sale or distribution of narcotic drugs) but it likewise fell far short of establising the essential elements of the statutory presumption, i.e. it failed to show by clear, convincing proof that tax paid stamps had not been obtained by appellant for the capsules here involved. In the words of the Government's counsel (Tr.212): "...the question of a tax stamp never was brought up" before appellant was indicted and convicted of a "presumed violation" of Section 4704(a).

The Government's case under 21 U.S.C. 174 is equally deleterious and unconstitutional. No effort was made by the Government at the trial to establish that the white powder taken from Barrington Williams was "imported", or that Williams, from whom it was taken, had any reason to believe it was "imported". Yet, Williams was convicted solely on the basis of the statutory "presumption" that "possession shall be deemed sufficient evidence (of illegal importation of the drug and defendant's knowledge thereof) to authorize conviction..."

But patently, the application of that "presumption" to justify appellant's conviction in the light of the evidence presented in this case is both exceedingly irrational and wrong,

with the result that said statutory presumption (in this case at least) clearly violates the Fifth and Sixth Amendments. First of all, while appellant's mere "possession" is purportedly "sufficient evidence" to show that Barrington Williams had "knowledge" that the heroin in the white powder in the capsules he held " had been imported into the United States contrary to law" (see 121. U.S.C. 174), the sworn testimony in this case simultaneously shows:

1. Neither of the arresting officers who took the capsules from appellant's person were able to determine from simply holding, observing or looking at the "white powder" therein contained that same consisted, in part at least, of heroin, much less "imported heroin" (Tr.122;137,138). In fact, Judge Pratt felt constrained to caution Officer Campbell during his testimony as follows (Tr. 138):

> "The Court: You can't testify as to what they (the capsules) contained because you only know as a result of what somebody told you, but you found 99 capsules."

2. Accordingly, both officers testified merely that when they took the said capsules from Williams, they contained a "white powder" (Tr. 122;137). How, in fairness, can the appellant rationally be charged with knowledge of "illegal imported heroin content" by mere possession of the capsules, when the arresting officers themselves were totally unable to determine from their "possession" whether the capsules had

any heroin content at all (domestic or imported)?

3. Moreover, when the said capsules were thereafter delivered by Officers Shaffer and Campbell into the possession of Officer Parker of the Narcotics Squad for examination and preliminary chemical analysis, Officer Parker, even after conducting his chemical tests, was unable to determine --

(i) the type of narcotic drug actually contained in the capsules (Tr. 156); or

(ii) the quantity of narcotic contained therein.

Again, if an officer assigned to the Narcotics Squad cannot, even after conducting a preliminary chemical analysis, determine whether the capsules taken from Williams contained heroin, how, in justice, can Williams be rationally presumed to know that said capsules contained "unlawfully imported heroin" simply because he was in possession of the capsules?

4. Officer Parker of the Narcotics Squad, after conducting his preliminary test, thereafter delivered the capsules to a Forensic Chemist employed by the Internal Revenue Service for detailed chemical analysis (Tr. 158-160). The said chemist, however, openly conceded that even after he performed all of the necessary chemical tests, it was still impossible for him to determine whether any heroin found in the capsules was "domestically produced or imported" (Tr.174).

Again, therefore, how can the appellant in this case be rationally and constitutionally charged by mere inference

from possession that the capsules he held contained "unlawfully imported heroin" when, after all possible chemical analysis, the Government itself was unable to establish conclusively that the heroin found in the capsules was actually imported as distinguished from a domestically produced drug?

5. Finally, the Government's expert narcotics witness, under cross-examination by counsel for appellant, readily testified (Tr. 164-177):

(i) That heroin is a derivative of morphine (Tr. 164);

(ii) That morphine is regularly manufactured in large quantity here in the United States (Tr. 165, 166, 168, 170);

(iii) That morphine is manufactured by pharmaceutical manufacturers in this country from opium they bring into the United States (Tr. 169);

(iv) That clandestine laboratories produce heroin from morphine by a process of acetylation (Tr. 169,170);

(v) That if a laboratory here in the United States has a supply of morphine, it could readily proceed to produce heroin anywhere in this country on a clandestine basis, albeit such production is illegal (Tr. 174); and

(vi) That heroin, no matter where produced, always "looks the same" (Tr. 174).

In sum and substance, therefore, the record before the Court bluntly refuted the idea that "all heroin must be imported" or that "all heroin is actually imported". On the contrary, the Government's own expert witness conceded that with a large,continuing morphine production here in the United States, it is entirely possible that heroin can be and in fact is produced in clandestine laboratories. Ergo, the presumption of 21 U.S.C. 174 is even more irrational than ever when viewed in the light of the uncontradicted testimony elicited in this case from the expert witnesses presented by the Government itself.

With this summary of the evidence in the case before the Court, we now turn to our Points and Authorities to demonstrate why the appellant's conviction must be set aside as one totally offensive to the Constitution of the United States.

Argument

Point I

The Search And Seizure Of The Capsules From Appellant's Person After He Was Detained On A Potential Charge of Simple Trespass or Unlawful Entry (Misdemeanors) Violated His Rights Under TheFourth Amendment To The Constitution. The District Court Thus Erred By Failing To Suppress the Capsules As Evidence And By Refusing To Dismiss The Indictment Based On The Seized Capsules Alone.

The evidence conclusively shows that when Officers Shaffer and Campbell initially detained or arrested appellant Williams, they took him into custody solely because he was

found in the abandoned, bombed out building on 14th Street. The officers were in that building, in response to a request they had received from the person in charge of the building, simply to "check the building" and possibly to remove or if necessary, arrest any trespassers found therein (Tr. 16;114). The offense of trespass or unlawful entry is a mere misdemeanor in the District of Columbia (District of Columbia Code, 1967 Edition, §22-3102). More specifically, the offense of "unlawful entry" is defined at §22-3102 of the Code as follows:

> "Unlawful Entry On Property - Any person who, without lawful authority, shall enter, or attempt to enter, any public or private dwelling, building or other property...against the will of the lawful occupant or of the person lawfully in charge thereof, or being therein or thereon, without lawful authority to remain therein or thereon shall refuse to quit the same on the demand of the lawful occupant, or of the person lawfully in charge thereof, shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $100, or imprisonment in the jail for not more than six months, or both, in the discretion of the court."

In this case, it is really doubtful that Williams was even actually guilty of the offense of unlawful entry as thus defined when the officers detained him. One of the arresting officers testified that the building involved was only partially abandoned -- a public restaurant was still in operation on the ground floor (Tr.55). The remainder of the building was largely destroyed during the April, 1968 riots

(Tr.55); but there were no signs on the abandoned portion of the building which said "No Trespassing" or directed persons to stay out (Tr.59). Thus, if the public was authorized to enter the restaurant in the building and there were no prominently displayed prohibitions against entering any area beyond the restaurant, it is at least doubtful that Williams was in violation of 22-3102 of the Code by simply being present in the building itself, especially in a portion which was admittedly unoccupied and abandoned. Moreover, there is no evidence before the Court to show that Williams was ever directed to leave the building or to stay out and that he refused to do so.

In any event, it is perfectly clear that when Officers Shaffer and Campbell initially detained Williams in the building at best they had no "probable cause" to believe that he was chargeable with any offense other than the misdemeanor of "unlawful entry". When Williams was initially arrested and brought to the fifth floor, the only questions put to him by the officers were related by them at the trial as follows (Tr.23, 47,59):

> (a) "We asked him why he was in the building. He couldn't give us no reason..."
>
> (b) "I asked him if he could give me a good explanation why he was in the building...He couldn't. He said he was waiting for a friend."
>
> (c) "I took Mr. Williams back upstairs to the fifth floor, at which time we asked him if he had any reasonable grounds for being in the building, did he

have any permission or anything. I believe he stated that he was supposed to meet some man there."

The record further shows that neither officer knew Williams, either personally or by reputation, prior to the very minute he was detained in the building (Tr.49). The officers themselves were not assigned to Narcotics operations (Tr.49); they were simply regular police officers on a foot patrol in the general area involved. Albeit they had "checked" the building in question several times during the prior week, at no time prior to Williams' arrest had they asked the D.C. Narcotics Squad to take any action with reference to the building itself (Tr.49); and they made no effort of any kind to bring the building or anyone using the building to the attention of the Federal Narcotics Agents (Tr.50).

Thus, it is perfectly clear that until the very moment appellant was detained by the two officers under the circumstances described above, neither had "probable cause" of any kind to search appellant's person for capsules or to arrest him. for violating the narcotics tax provisions of the Internal Revenue Code (26 U.S.C.4704(a)) or the narcotic importation provisions of 21 U.S.C. 174. This fact was completely conceded by the arresting officers who testified further as follows (Tr.23,24):

"When they brought the defendant, later identified as Williams, back to the fifth floor,

I noticed a bulge in his left front pocket, which I figured might have been a weapon. He has no visible means of being in the building.

"We asked him why he was in the building. He couldn't give us no reason, so I patted him to see if he had a gun, or whatever it might have been in his pocket, it felt like it was -- I don't know, something soft - ...

"So I pulled the bag out and looked, and it contained 99 capsules of white powder, which was turned over to the Narcotics Division...

"Q. Was there any weapon in the pocket you searched?

"A. Just the bag...

"Q. And until you actually put your hand into the defendant's pocket, you had no reason to believe that he actually possessed narcotics, that he personally possessed narcotics?

"A. No,..except the fact he was in the building and apparently he knew the gentlemen that were up there."

Appellant respectfully submits that the unreasonable and totally unnecessary search of the interior of his pockets under the circumstances described above and which took place without a warrant -- and the ensuing seizure of the envelope from inside his pants pocket -- patently violated his rights under the Fourth Amendment which, of course, reads as follows:

> "The right of the people to be secure in their persons, houses and papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

In Sibron v. State of New York, 392 U.S. 40, decided by a unanimous Supreme Court a little more than a year ago, the defendant Sibron was arrested under the following circumstances: On March 9, 1965, the arresting officer was patrolling his beat on Broadway in New York City when he observed the defendant over a period of approximately 8 hours "in conversation with six or eight persons whom he (Patrolman Martin) knew from past experience to be narcotics addicts". Later in the evening, the defendant Sibron entered a restaurant and the officer saw him speak to 3 more known addicts inside the restaurant. Sibron was thereafter in the process of eating when the officer entered the restaurant and told him to come outside. Once outside, the officer placed Sibron under detention and thrust his hand into Sibron's pocket, where he found some envelopes which turned out to contain heroin. Sibron was thereafter charged with unlawful possession of heroin. He moved to suppress the introduction of the heroin at his trial, but his motion was denied and he was subsequently convicted. Upon appeal to the Supreme Court, Sibron's conviction was reversed. Mr. Chief Justice Warren, writing for the Court stated, at pages 62,63:

> "Turning to the facts of Sibron's case, it is clear that the heroin was inadmissible in evidence against him. The prosecution has quite properly abandoned the notion that there was probable cause to arrest Sibron for any crime at the time Patrolman Martin accosted him

in the restaurant, took him outside and searched him. The officer was not acquainted with Sibron and had no information concerning him.....The inference that persons who talk to narcotics addicts are engaged in the criminal traffic in narcotics is simply not the sort of reasonable inference required to support an intrusion by the police upon an individual's personal security. Nothing resembling probable cause existed until after the search had turned up the envelopes of heroin. It is axiomatic that an incident search may not precede an arrest and serve as part of its justification. E.g. Henry v. United States, 361 U.S. 98...; Johnson v. United States, 33 U.S. 10, 16-17. Thus the search cannot be justified as an incident to a lawful arrest..."

And, at pages 65,66 the Chief Justice stated:

"Even assuming arguendo that there were adequate grounds to search Sibron for weapons, the nature and scope of the search conducted by Patrolman Martin were so clearly unrelated to that justification as to render the heroin inadmissible. The search for weapons approved in Terry[3] consisted solely of a limited patting of the outer clothing of the suspect for concealed objects which might be used as instruments of assault. Only when he discovered such objects did the officer in Terry place his hands in the pockets of the men he searched. In this case, with no attempt at an initial limited exploration for arms, Patrolman Martin thrust his hand into Sibron's pocket and took from him envelopes of heroin. His testimony shows that he was looking for narcotics, and he found them. The search was not reasonably limited in scope to the accomplishment of the only goal which might conceivably have justified its inception -- the protection of the officer by disarming a potentially dangerous man. Such a search violates the guarantee of the Fourth Amendment which protects the sanctity of the person against unreasonable intrusions on the part of all government agents."

(Emphasis supplied)

3/ Terry v. Ohio, 392 U.S.1

Applying the reasoning of Sibron to the case at bar, we submit it is clear that at the time the officers detained defendant in the case at bar there was no "probable cause" to arrest him for violating the penal provisions of either the narcotics tax laws or the narcotics import laws; nor was there any "probable cause" to arrest him for any other felony. At the time he was physically seized by the two officers, their sole concern was Williams' physical presence in the abandoned, burned-out building. Trespass is, as stated above, merely a misdemeanor, not a crime, and as stated it is extremely doubtful that Williams was properly chargeable with even that misdemeanor when detained. Indeed, the record shows that Williams was never even charged with the offense of unlawful entry. The sole charges lodged against him were those which stemmed from the unlawful search.

Moreover, the evidence shows that at the time of his detention Williams was not armed and the officers found from an outer patting of his clothing no weapons on his person and no hard objects which might even resemble a weapon. The only "bulge" in his pockets was "soft" -- obviously not a weapon. Under these conditions, Sibron would clearly apply to require a ruling that the arresting officers in the instant case had no adequate grounds to search Williams' inner pockets because the search of his outer clothing demonstrated beyond doubt that he

was unarmed. It is clear, we submit, that the District Court should have applied the Fourth Amendment and Sibron to this case, suppressed the capsules as evidence and dismissed the indictment exclusively predicated on the fruit of the poisonous search.

In Amador-Gonzalez v. United States, 391 F.2d. 308 (1968), decided just a little more than a year ago, the United States Court of Appeals for the Fifth Circuit was confronted with a case involving facts very similar to those presented by the unconstitutional search and seizure in the case at bar. In Amador-Gonzalez detectives assigned to the Narcotics Division of the El Paso Police Department were on the lookout for illegal importations of narcotics from Mexico. One of them, in an unmarked car, was stationed near the border when he saw the defendant Gonzalez driving an automobile with New Mexico license plates and a Mexican flag attached to the radio antenna. The detective noticed that Gonzalez was violating the local traffic laws by unlawfully cutting into the wrong driving lane and that he was exceeding the speed limits. Accordingly, he stopped Gonzalez's car. The officer thereupon learned from Gonzalez that he was from Mexico, and he therefore became "suspicious" of Gonzalez and thought he might be connected with narcotics smuggling.

Accordingly, when Gonzalez stepped out of his car during

the questioning connected with the asserted traffic violations, the detective reached into the automobile and in a hole located in the front of the car, he found and seized a bundle which contained heroin. Gonzalez, like defendant Williams in the case at bar,, was thereupon charged with a violation of 21 U.S.C.174 -- unlawful importation and concealment of narcotics. Also, like Williams, who has never been charged with loitering or trespass in this case, Gonzalez was never charged with any violation of the traffic laws of El Paso.

Gonzalez was convicted in the United States District Court, but upon appeal to the Fifth Circuit, the conviction was reversed and the indictment dismissed. Judge Wisdom, writing for a unanimous Court, stated in the course of the Circuit Court's opinion, at page 313:

> "The lawfulness of an arrest does not always legitimate a search. General or exploratory searches are condemned even when they are incident to a lawful arrest. United States v. Rabinowitz, 339 U.S. 62; Carlo v. United States, 2 Cir. 1961, 286 F.2d. 841,846. The arrest must not be a mere pretext for an otherwise illegitimate search. Henderson v. United States, 4 Cir. 1926, 12 F.2d. 528; Worthington v. United States 6 Cir. 1948, 166 F.2d. 5571; McKnight v. United States, 1950, 87 U.S. App. D.C. 151, 183 F.2d. 977; United States v. Harris, 6 Cir. 1963, 321 F.2d. 739; Taglavore v. United States, 9 Cir. 1961, 291 F.2d. 262. The search must have some relation to the nature and purpose of the arrest...
>
> "Gonzalez was arrested for a minor traffic offense. It is not clear at just what time the traffic arrest turned into a narcotics arrest, but it could not have been until after the search.

Until that time there was no probable cause to believe the vehicle was transporting narcotics and no probable cause to make an arrest for the possession of drugs. See Henry v. United States 361 U.S. 98, in which the Supreme Court held that the defendant's arrest took place when the officers stopped his car, even though a formal arrest was made at a later time and the "fact that afterwards contraband was discovered is not enough" to legitimatize the search."

And, at page 315, Judge Wisdom stated:

"I...hold that pretext or no pretext, a lawful arrest of an automobile driver for a traffic offense provides no lawful predicate for the search of the driver or his car..."

Finally, at pages 318, 319 Judge Wisdom summarized the gravamen of the decision in Amador-Gonzalez as follows:

"The significant element in this case is the danger that the lowly offense of a traffic violation -- of which all of us have been guilty at one time or another -- may be established as the basis for searches circumventing the rights guaranteed by the Fourth Amendment. This danger exists in lawful traffic arrests as well as in pretextual arrests...

"Courts are reluctant to reverse a criminal conviction on procedural grounds when there has been a jury verdict supported by a strong evidence of guilt. But the Bill of Rights is a basic premise on which our system of law and order rests. It is engraved on the conscience of the court, to be heeded in a narcotics case no less than in any other case."

In the case at bar, the arresting officers detained Williams for the "lowly offense" of trespassing or unlawful entry, an offense for which the law specifies $100. fine or 6 months in jail. That offense, under the facts here presented, has no relationship whatsoever to the two felony crimes of which Williams now stands convicted and for which he has been

sentenced to 10 years in prison. The search of Williams' inner pocket and the seizure of the envelope containing the capsules clearly had no relationship to the initial arrest or detention for mere unlawful entry. Ergo, under the doctrine of Sibron and Amador-Gonzalez, the capsules, taken from Williams' person without a warrant, should have been suppressed as evidence in the prosecution limited to the two felony crimes alone.

The Court's attention in this regard is also directed to the decisions in United States v. Rachel, C.C.A. Ill.1966, 360 F.2d. 858; Taglavore v. United States, C.C.A. 9 1961, 291 F.2d 262, and Charles v. United States, C.C.A. 9, 1960, 278 F.2d. 386. In Rachel, The Court of Appeals held that a search for and seizure of marijuana by government agents without a warrant at a time when the defendant was under physical arrest for another offense (accessory to counterfeiting) violated defendant's rights under the Fourth Amendment, since, at the time of arrest, the officers had no "probable cause" to support either a narcotics arrest or a narcotics search and seizure. The marijuana was accordingly suppressed as evidence and the indictment under 26 U.S.C. 4744 was ultimately dismissed.

In Taglavore, the appellant, a cab driver, was arrested on the basis of a warrant which charged him with two traffic violations.At the time the warrant was delivered to the arresting officers, they were advised by a Superior that "there was an

excellent chance appellant would have marijuana cigarettes in his possession when they found him". Accordingly, when the arrest was made, the officers noticed that appellant removed something from his pants pocket and put it in his mouth. The officers thereupon removed from appellant's mouth an object which turned out to be a piece of a marijuana cigarette. Appellant was thereupon charged and convicted of possession of marijuana, although he repeatedly moved to suppress the cigarette from evidence on the ground his person was searched and the cigarette seized in violation of the Fourth Amendment. The Court of Appeals reversed the conviction, stating at page 265:

> "...the search must be incident to the arrest, and not vice versa."

And, at page 266:

> "...Were the use of misdemeanor arrest warrants as a pretext for searching people suspected of felonies to be permitted, a mockery could be made of the Fourth Amendment and its guarantees."

Finally, of real pertinence to the issue involved in the case at bar, the Court stated in Taglavore, at page 266:

> "While it is true that a police officer may, under proper circumstances, arrest a person without a warrant when he believes that person has committed or is committing a felony, it is required that he have "probable cause" for his belief in order for the arrest to be valid. Brinegar v. United States, 1949, 338 U.S. 160, 69 S.Ct. 1302, 93 L.Ed. 1879 Probable cause means more than bare suspicion...On the record before us in the instant case we do not believe that the two inspectors had probable cause to arrest appellant for a narcotics violation... While attempting to run when confronted with arrest was strong evidence of guilt of something, it did not of itself indicate guilt of possessing narcotics..." (Emphasis supplied)

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 (Emphasis supplied)

In United States v. Tate, D.C. Del., 1962, 209 F. Supp. 762, facts somewhat akin to those here presented were involved, and again the Court ruled the search, which produced property not remotely akin to the misdemeanor for which the defendant was already arrested, violated the Fourth Amendment. At page 765, the Court stated:

> "The record in this case lacks any indication of what the trooper was looking for in Tate's automobile. Quite obviously, he could not have been looking for the fruits of the crime for which Tate was arrested - there are no fruits of speeding...There was no general police alarm being broadcast for a person of defendant's description, nor did the trooper upon arresting defendant recognize him as a person with a long criminal record.
>
> "The Government contends that the search can be justified as a search for weapons of escape from custody. This argument is difficult to accept either factually or legally. There is no direct testimony in the record that the trooper was looking for a weapon...or that he even suspected the existence of one."

In the face of this long line of authorities, it is respectfully submitted that Judge Pratt erred when he denied the motion to suppress in this case solely on the basis of this Court's brief, per curiam decision in Aaron S. Thomas v. United States, No. 22,063, decided May 19, 1969 (Tr.88,89). In that case, this Court's opinion states at the very outset that "the only issue" there presented "is that of whether a search of appellant's person was illegal because it was not incidental to a valid arrest". This Court construed §4-140 of the

District of Columbia Code to authorize an arrest for unlawful entry without a warrant when that offense took place in the officer's"presence"-as "distinct from within his view". Nevertheless, even without considering or ruling on all of the additional issues raised by this appeal, this Court openly conceded that the Thomas case was still "a close one".

Here, there is no issue under §4-140 as to whether Williams could properly be arrested without a warrant on suspicion of unlawful entry. The issue here goes far beyond that question. It is: Were Williams' rights under the Fourth Amendment violated within the meaning of Sibron, Amador-Gonzalez and Taglavore, supra, when the arresting officers, having detained him for the alleged lowly offense of unlawful entry, unnecessarily then proceeded to search his person and the inner pockets of his clothing for narcotics. Or to put the issue another way, were Williams' Fourth Amendment rights violated by the search of his person for narcotics when the arresting officers prior thereto had no "probable cause" to believe Williams was in violation of either 26 U.S.C. 4704(a) or 21 U.S.C. 174. Williams was arrested on suspicion of unlawful entry, a misdemeanor. That charge was never levelled against him. Instead, he was unconstitutionally searched, and as a result of that search, and solely because of that search, he was charged and convicted of two felonies which patently have no connection with the original misdemeanor for which he

was initially detained.

Clearly, we submit, the motion to suppress should have been granted and since the entire indictment was founded on the spurious evidence unconstitutionally seized, it likewise should have been dismissed, as a matter of law, by the District Court.

Point II

Appellant's Rights Under The Fifth Amendment Were Violated By His Conviction On Count One Of The Indictment Which Charges That Appellant "Purchased, Dispensed And Distributed Not In The Stamped Package And Not From The Original Stamped Package A Narcotic Drug When, As A Matter of Law, The Courts Have Recognized That To Have Obtained Such Tax Stamps Would Have Required Appellant To Incriminate Himself.

In a long line of recent d cisions, the Supreme Court has ruled that a plea of the Fifth Amendment privilege provides a complete defense against criminal charges grounded on a failure to pay a tax or to obtain tax stamps when to have done so would have required the defendant to incriminate himself with reference to some other specified crime (Marchetti v. United States, 390 U.S. 39, 88 S. Ct. 697; Grosso v. United States 390, U.S. 62, 88 S. Ct. 709; Haynes v. United States, 390 U.S. 85,88 S. Ct. 722; Leary v. United States, 395 U.S. 6, 89 S. Ct. 1532).

In Marchetti, the Supreme Court applied the Fifth Amendment to block conviction in a prosecution for failure to register and pay the occupational tax on wagers, as required

by 26 U.S.C. §§ 4411-4412. The Court noted that wagering was a crime in almost every State, and that 26 U.S.C. § 6107 required that lists of wagering taxpayers be furnished to state and local prosecutors on demand. The Court thus concluded that compliance with the tax statute would have subjected the defendant to a real and appreciable risk of self-incrimination.

In Grosso, the Court applied the same reasoning and held that the Fifth Amendment was an absolute defense to a prosecution under 26 U.S.C. § 4401, which imposes an excise tax on proceeds from wagering. And, in Haynes, the Court ruled that the Fifth Amendment privilege provided a defense against prosecution for possession of an unregistered weapon under the National Firearms Act, 26 U.S.C. 5851, despite the fact that in some instances registration under the statute would not be incriminating.

Finally, in Leary, a landmark case in the field of narcotics violation prosecutions, the Court held that a Fifth Amendment plea of self-incrimination was an absolute defense to a prosecution very similar to the one under Count One of the indictment in the case at bar. Leary, of course, was convicted of a violation of 26 U.S.C. 4744(a) which makes it unlawful for a transferee required to pay the 4741(a) transfer tax either to accept marijuana without having paid the tax or to transport, conceal, or facilitate the transportation or concealment of any marijuana so acquired. The Supreme Court reversed Leary's conviction, holding at 89 S. Ct. 1537, 1538:

"If read according to its terms, the Marijuana Tax Act compelled petitioner to expose himself to a "real and appreciable" risk of self-incrimination, within the meaning of our decisions in Marchetti, Grosso, and Haynes. Section 4741-42 required him, in the course of obtaining an order form, to identify himself not only as a transferee of marijuana but as a transferee who had not registered and paid the occupational tax under §§4751-4753. Section 4773 directed that this information be conveyed by the Internal Revenue Service to state and local law enforcement officials on request.

"Petitioner had ample reason to fear that transmittal to such officials of the fact that he was a recent, unregistered transferee of marijuana "would surely prove a significant 'link in a chain' of evidence tending to establish his guilt under the state marijuana laws then in effect. When petitioner failed to comply with the Act, in late 1965, possession of any quantity of marijuana was apparently a crime in every one of the 50 States, including New York, where petitioner claimed the transfer occurred, and Texas, where he was arrested and convicted."

The Supreme Court pointed out further, in Leary, that if Leary had applied for and obtained the necessary tax stamps, he would have also been liable to federal prosecution under 21 U.S.C. 176(a), a Food and Drug statute similar to the one upon which Count Two of the indictment in the case at bar is predicated (89 S. Ct. 1532, 1537(fnt.14)).

In the instant case, the statutory tax scheme involved is set forth at 26 U.S.C. 4701-4707 and 4771-4775, and it is remarkably similar to the Marijuana Tax Act statutory scheme involved in Leary. Indeed, 26 U.S.C. 4771-4775 are the very same tax stamp provisions with which the Supreme Court dealt in Leary.

26 U.S.C. 4701 imposes a tax on "narcotic drugs, produced or imported into the United States, and sold, or removed for consumption or sale". The tax is to be paid by the importer, manufacturer, producer or compounder of the drugs. Section 4703, entitled "Affixing of Stamps", prescribes that the tax is to be evidenced by stamps, and those stamps are to be obtained under the provisions of 26 U.S.C. 4771, one of the tax provisions involved in Leary.

26 U.S.C. 4704(a), under which appellant Williams stands convicted, is likewise very similar to 26 U.S.C. 4744 under which Leary was convicted by the lower court. Section 4704(a) states:

> "It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate tax paid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found.[4]
>
> (Emphasis supplied)

26 U.S.C. 4771, entitled "Stamps", states that "The taxes imposed by sections 4701 (the Act involved inthis case) and 4741 (the Marijuana Act involved in Leary) shall be represented by appropriate stamps. An "order form" for the stamps prescribed by Section 4771 is provided for by 26 U.S.C. 4705 (in the Act

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[4]/Compare 26 U.S.C. 4744, which sets forth a substantially similar prohibition and "presumption" with reference to Marijuana.

involved in this case) and 4741 (the Marijuana Act involved in Leary). The stamps to be issued in both cases are identical.

Under 26 U.S.C. 4773, as in Leary, order forms submitted for stamps under 26 U.S.C. 4705 are to be held --

> "open to inspection by officers and employees of the Treasury Department duly authorized for that purpose, and such officials of any State or Territory...or the District of Columbia...as shall be charged with the enforcement of any law or municipal ordinance regulating...the sale, prescribing, dispensing, dealing in, or distribution of narcotic drugs or marihuana. The Secretary or his delegate is authorized to furnish, upon written request, certified copies..toany of such officials...as shall be entitled to inspect..."

In the District of Columbia, of course, where the appellant, Barrington Williams, resides and where he was arrested, simple possession of narcotics is a crime.(D.C. Code, 1967 Edition, 33-402). In Leary, the Supreme Court recognized that at least "48 States and the District of Columbia have on their books in some form essentially the provisions of the Uniform Narcotic Drug Act" (89S.Ct. 1532,1538, fnt.15).

Accordingly, we submit this Court must conclude here, as the Supreme Court did in Leary, that -- (See 89 S.Ct. 1532, 1537):

> "If read according to its terms, the (Harrison Narcotics) Act compelled (appellant) to expose himself to a "real and appreciable" risk of self-incrimination, within (the Supreme Court's) decision in Marchetti, Grosso...Haynes (and Leary)."

Sections 4701-4705 required Williams, in the course of paying the tax and securing the forms prescribed by Section 4705, to identify himself as a person possessed of a narcotic drug. Williams had ample reason to fear that transmittal to the Government of the fact that he had in his possession a narcotic drug, or that he desired either to purchase, sell, dispense or distribute such drug within the meaning of Section 4704 "would surely prove a significant link in a chain of evidence tending to establish his guilt under the District of Columbia narcotics law then in effect (See Leary, 89 S.Ct. 1537). Such action, as demonstrated by the Supreme Court, would also expose him to prosecution under 21 U.S.C. 174, the provision under which he has now been convicted in Count Two of the indictment.

A fortiori, we urge this Court to hold, as the Supreme Court did in Leary (89 S.Ct. 1532, 1544)...

> "That petitioner's invocation of the privilege was proper and that it should have provided a full defense to the (First)Count of the indictment. Accordingly, we reverse petitioner's conviction.."

See also, United States v. Covington, 89 S.Ct. 1559(1969).

Point III

Appellant's Rights Under The Fifth and Sixth Amendments Were Ignored And Destroyed When He Was Convicted Of Violating 26 U.S.C. 4704(a) Solely On The Basis Of the Statutory Presumption That Possession Of The Unstamped Capsules Was Enough To Prove That Appellant Either Purchased, Sold, Dispensed or Distributed The Heroin In The Capsules.

The crime prescribed by 26 U.S.C. 4704(a) is "to purchase, sell, dispense or distribute narcotic drugs" without a taxpaid

stamp. The Government introduced no evidence whatsoever either to prove that Williams/purchased, sold, dispensed or distributed the heroin he possessed in any respect. The record is uncontradicted in this respect. From the time Williams was first observed by the officers until the time the capsules were seized from his pocket, those capsules remained in Williams' pocket and he made no effort to purchase, sell, dispense or distribute any narcotics.

Thus, Williams was convicted solely because Section 4704(a) states the following statutory presumption:

> "...the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found."
>
> (Emphasis supplied)

In its very recent decision in Turner v. United States, Oct. Term, 1969 No. 190 (1/20/70), the Supreme Court construed the statutory inference of Section 4704(a) as follows, at page 21 of the slip opinion:

> "True, the statutory inference...could not be sustained insofar as it authorized an inference of dispensing or distributing (or of selling) if that act had been charged), for the bare fact of possessing heroin is far short of sufficient evidence from which to infer any of these acts."

In Turner, the Court went on to affirm Turner's conviction under Section 4704(a), however, solely because it found in that case that "indivisibly linked" with evidence of possession of narcotics there "was the fact that Turner possessed some 275 glas-

sine bags of heroin without revenue stamps attached". "This evidence", the Coutt held, "without more, solidly established that Turner's heroin was packaged to supply individual demands and was in the process of being distributed, an act barred by the statute".

In the case at bar, however, there was no attempt made by the Government to establish any evidence other than the naked statutory inference to be drawn from possession alone. Ergo, under the Supreme Court's above holding in Turner, "the bare fact of possessing heroin... is far short of sufficient evidence" of either sale, distribution or dispensing of the said heroin -- i.e. the inference alone is not enough to establish, beyond a reasonable doubt, the essential elements of the crime charged against Williams.

Regarding the element of "purchasing" which is outlawed by Section 4704, the Supreme Court in Turner made two separate holdings:

1. At page 21 of the slip opinion, it vaguely inferred that "purchasing" might in some cases flow from proof of the statutory inference. At page 22, the Court readily conceded that "perhaps a few acquire (heroin) by gift and some heroin is undoubtedly stolen, but most users may be presumed to purchase what they use."

2. At page 23, 24 of its opinion, the Court ruled, with reference to cocaine under Section 4704(a):

> "Since Turner's possession of cocaine did not compromise an act of purchasing, dispensing or distributing, the instruction on the statutory inference becomes critical. As in the case of heroin, bare possession of cocaine is an insufficient predicate for concluding that Turner was dispensing or distributing. As for the remaining possible violation, purchasing other than in and from the original stamped package, the presumption, valid as to heroin, is infirm as to cocaine...
>
> "...sufficient amounts of cocaine are stolen from legal channels to render invalid the inference... The thief who steals cocaine very probably obtains it in or from a stamped package. There is a] reasonable possibility that Turner either stole the cocaine himself or obtained it from...the actual thief. The possibility is sufficiently real that a conviction resting on the 4704(a) presumption cannot be deemed a conviction based on sufficient evidence."

Mr. Justice Marshall in his concurring opinion in Turner sharply disagreed with the other members of the majority stating:

> "...Turner himself may well have obtained the heroin involved here in any number of ways -- for example, by stealing it from another distributor, or by manufacturing or otherwise acquiring it abroad and smuggling it into this country. Given the dangers that are inherent in any statutory presumption or inference...I cannot agree with the wholly speculative and conjectional holding that because Turner possessed heroin he must have purchased it in violation of §4704(a)."

Justices Black and Douglas, of course, vigorously dissented in Turner, stating that "Few if any decisions of this Court have done more than this one today to undercut and destroy the due process safeguards the federal Bill of Rights specifically provides to protect defendants charged with crime in

United States courts".

In any event, in the case at bar, Judge Pratt went far beyond anything even vaguely suggested by Justice White's opinion in Turner when he submitted this case to the jury and failed to dismiss the indictment as a matter of law albeit the Government did not even establish beyond a reasonable doubt the two elements required to support the basic statutory inference itself. Those elements are (a) possession and (b) a showing that Williams failed to have taxpaid stamps to cover the capsules in his possession. In his closing argument, counsel for the Government conceded (Tr.212): "Ladies and gentlemen, you heard the testimony from the police officers with regard to the question of whether or not there was a tax stamp. They told you ...the question of a tax stamp never was brought up."

And, of course, both of the arresting officers candidly testified that theynever even asked Williams "to exhibit a tax stamp with reference to that envelope" or whether he had ever applied for same (Tr. 127; 140,141). In fact, the officers admitted that, since they were not narcotics agents, they did not know how the required stamp even looked (Tr.128;140).

In conclusion, therefore, we respectfully urge the Court in this case to rule as follows:

1. Adopt the reasoning of Justice Marshall's concurring opinion (and indeed the reasoning of "most" of the majority opinion) in Turner and hold that the statutory inference standing alone is not sufficient to support Williams' conviction

2. At page 23, 24 of its opinion, the Court ruled, with reference to cocaine under Section 4704(a):

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Justices Black and Douglas, of course, vigorously dissented in Turner, stating that "Few if any decisions of this Court have done more than this one today to undercut and destroy the due process safeguards the federal Bill of Rights specifically provides to protect defendants charged with crime in

United States courts".

In any event, in the case at bar, Judge Pratt went far beyond anything even vaguely suggested by Justice White's opinion in Turner when he submitted this case to the jury and failed to dismiss the indictment as a matter of law albeit the Government did not even establish beyond a reasonable doubt the two elements required to support the basic statutory inference itself. Those elements are (a) possession and (b) a showing that Williams failed to have taxpaid stamps to cover the capsules in his possession. In his closing argument, counsel for the Government conceded (Tr.212): "Ladies and gentlemen, you heard the testimony from the police officers with regard to the question of whether or not there was a tax stamp. They told you ...the question of a tax stamp never was brought up."

And, of course, both of the arresting officers candidly testified that theynever even asked Williams "to exhibit a tax stamp with reference to that envelope" or whether he had ever applied for same (Tr. 127; 140,141). In fact, the officers admitted that, since they were not narcotics agents, they did not know how the required stamp even looked (Tr.128;140).

In conclusion, therefore, we respectfully urge the Court in this case to rule as follows:

1. Adopt the reasoning of Justice Marshall's concurring opinion (and indeed the reasoning of "most" of the majority opinion) in Turner and hold that the statutory inference standing alone is not sufficient to support Williams' conviction

of selling, purchasing, dispensing or distributing narcotics under Section 4704(a);

2. Establish the rule that, at the very least, the Government must prove both elements of the statutory inference beyond a reasonable doubt; and that in this case the Government failed to carry even that burden beyond a reasonable doubt.

Anything less than this, we submit, would leave appellant convicted of a crime, of which the Government has offered no direct proof, and the victim of a conviction based on an inference, which the Government has likewise failed to establish beyond a reasonable doubt.

Point IV

Appellant's Rights Under the Fifth And Sixth Amendments Were Likewise Destroyed When He Was Convicted Under 21 U.S.C. 174 On The Basis Of A Statutory Inference That Proof of Possession Alone is Enough to Support A Finding That Defendant Knew The Capsules He Was Holding Possessed Unlawfully Imported Heroin.

In Leary, supra, the Supreme Court carefully reviewed its prior decisions in Tot v. United States, 319 U.S. 463, United States v. Gainey, 380 U.S. 63 and United States v. Romano 382 U.S. 136 and reached the following conclusion at 89 S.Ct. 1532, 1548:

> "The upshot of Tot, Gainey and Romano is, we think, that a criminal statutory presumption must be regarded as "irrational" or "arbitrary" and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend."
>
> (Emphasis supplied)

Applying that rule to the statutory presumption contained in 21 U.S.C. 176(a) --[the presumption that possession of marijuana is sufficient evidence that the possessor knew it was unlawfully imported into the United States], the Supreme Court in Leary rejected that presumption, stating at 89 S.Ct. 1556, 1557:

> "We conclude that the "knowledge" aspect of the §176(a) presumption cannot be upheld without making serious incisions into the teachings of Tot, Gainey and Romano. In the context of this part of the statute, those teachings require that it be determined with substantial assurance that at least a majority of marijuana possessors have learned of the foreign origin of their marijuana...
>
> "We find it impossible to make such a determination...It must also be recognized that a not inconsiderable proportion of domestically consumed marijuana appears to have been grown in this country, and that its possessors must be taken to have "known" if anything, that their marijuana was not illegally imported. In short, it would be no more than speculation were we to say that even as much as a majority of possessors "knew" the source of their marijuana...
>
> "We thus cannot escape the duty of setting aside petitioner's conviction under Count 2 of the indictment."

However, within less than a year thereafter, in its recent decision in Turner v. United States, supra, the Supreme Court refused to extend Leary, Tot, Gainey and Romano to reject the almost identical statutory presumption contained in 21 U.S.C. 174 (upon which appellant Williams was convicted under Count Two of the indictment in this case) solely because the Court concluded that "at the present time heroin is not produced in this country" (Slip Opinion, pg.9). The Court simultaneously ruled, however, that the identical presumption contained in 21 U.S.C.

174 was invalid as applied to cocaine because "much more cocaine is lawfully produced in this country than is smuggled into this country" (Slip Opinion, pg.19).

Obviously, for the purposes of this appeal, we probably have to start by accepting the Supreme Court's finding that "heroin is not produced in this country", although the record in this case makes that conclusion exceedingly doubtful at the very least. The Government's own expert witness testified here (1) that "heroin is derived from morphine" (Tr.164); (2) that "morphine, a derivative of opium, is regularly manufactured here in the United States by numerous leading pharmaceutical manufacturers (Tr. 165-170); that heroin is produced from morphine by an acetylation process (Tr.169,170); that clandestine laboratories regularly use that process to convert morphine into heroin (Tr.170,171); and that these laboratories usually operate on an illegal basis (Tr.170). The Government's witness thereupon concluded this line of testimony as follows, at page 174 of the transcript:

> "Q. Do you know of anything, other than possible legal provision which would prevent the production of heroin in the United States, Mr. Witness?...
>
> "The Witness: I would have to think about it. What you want me to say, if you had morphine, you could make heroin?
>
> "Mr. Merrigan: Yes.
>
> "The Witness: It wouldn't be any particular problem if you had the proper equipment.

"Mr. Merrigan: Here in the United States?

"The Witness: Anywhere."

But, irrespective of the aforementioned fog which still surrounds the Supreme Court's ruling in Turner, we submit that, for reasons which the Supreme Court did not even consider in Turner, the statutory presumption of 21 U.S.C. 174 must nevertheless still be ruled "irrational" or "arbitrary"; and hence unconstitutional in this case.

First of all, Section 174 is not limited to heroin alone. It covers the importation of "any narcotic drug into the United States", and its statutory presumption states that "possession of the narcotic drug" is to "be deemed sufficient evidence" of the possessor's knowledge that the narcotic drug he possesses was unlawfully imported. The term "narcotic drug" is defined by 21 U.S.C. 171 and 26 U.S.C. 4731 to include opium, any compound or derivative" of opium (which would include morphine; heroin; and other derivatives of the opium poppy which are regularly and lawfully manufactured here in the United States) and cocaine, which the Supreme Court has now found to be regularly manufactured here in the United States.

Thus, under the provisions of 21 U.S.C. 174, Williams or any other uneducated person could reasonably possess 99 capsules of "white powder" which he believes to be a "narcotic drug" as defined in the statute, but which may or may not contain heroin, or which may or may not contain

cocaine or some other derivative of opium. If the powder contains cocaine only, under Turner, the statutory presumption of knowledge of unlawful importation has already been voided. If the powder contains morphine or codeine, the Supreme Court has likewise ruled, in Turner, that those derivatives of opium are also manufactured in quantity here in the United States; so again the statutory presumption of knowledge of unlawful importation has been effectively voided.

Thus, if the presumption is rationally to apply to the narcotic drug heroin alone, then, in fairness under the Constitution, there must be something about the appearance of heroin itself which would immediately put the possessor on notice that the capsules which have come to him or which he has obtained clearly contain heroin, or as the Supreme Court has now ruled, "imported heroin". But, the record in this case makes it clear that no one can really tell by mere possession of the capsules and the powder therein contained that he has heroin on his person. Even narcotics experts are totally unable to detect the drug by mere possession or examination. Its presence in a capsule can only be established by expert chemcial analysis.

Thus, in this case, while the obnoxious presumption was applied by the District Court to convict poor Williams, an uneducated negro laborer, of "automatic knowledge" that he possessed 99 capsules which contained a small % not only of heroin, but of "unlawfully imported heroin", the Government's

witnesses against him, to a man, testified they were totally unable to detect the presence of heroin, or to determine what narcotic drug, if any, was contained in the said capsules until same were submitted to detailed chemical analysis. (Tr. 25; 121; 136;137; 153;156). The arresting officers stated that when they seized the capsules, same contained "a white powder". They suspected the capsules might contain some form of narcotic, but they were not sure (Tr.25). When counsel for appellant sought to press the arresting officers on this subject, Judge Pratt intervened and stated (Tr.26):

> "The Court: He couldn't carry a travelling chemistry kit with him...
>
> "Mr. Merrigan: Your Honor, I wasn't suggesting that.
>
> "The Court: How would he know unless he analyzed what he found?"

But, of course, we suggest that appellant Williams should also have the benefit of this line of reasoning by the Court. How could Williams fairly or rationally be presumed to know what the capsules contained if the law enforcement officials themselves were totally unable to make that determination without chemical analysis?

The story, however, does not end there. When the arresting officers took Williams to the 13th Precinct, they immediately summoned Officer Parker of the Narcotics Squad to test the "white powder" found in Williams' capsules. Parker performed a chemistry test on the powder (Tr.153). The test resulted in a "purple color

reaction" (Tr.153). This simply indicated the white powder contained "a narcotic drug of the opiate group" (Tr.156). That group, of course, includes morphine and codeine (Tr.156). Even with that test, however, the police were unable to establish that the capsules contained heroin.

Again, we ask, if even after preliminary chemistry tests, it was impossible to establish the presence of heroin, much less the presence of imported heroin in Williams' capsules, how can it be rational or fair to presume from Williams' mere possession of the capsules themselves that he knew the capsules contained "unlawfully imported heroin"? In this connection, the Government's star expert chemistry witness testified that there is no chemical analysis known, no matter how thorough, which can establish any difference between "domestically produced and imported heroin" (Tr.174).

For these reasons, therefore, we urge this Court to reverse Williams' conviction under 21 U.S.C. 174 and to rule that, in this case, the criminal statutory presumption applied to convict Williams was irrational, arbitrary and hence unconstitutional (See United States v. Peeples, CCA 2, 1967, 377 F.2d. 205).

Point V

Appellant's Right To A Fair Trial Before An Impartial Jury Was Violated By The Prosecutor's Closing Argument Wherein He Inflamed The Jury, Without Any Support In The Evidence, By Insisting That the Jury Must Assume Williams Was Either "A Narcotics Addict Or A Narcotics Pusher".

In Berger, v. United States, 295 U.S. 78,88 (1935), the Supreme Court ruled that a United States Attorney, in his closing

argument to a jury in a criminal case, "may strike hard blows, but he is not at liberty to strike foul ones". And, when he does, the defendant is entitled to a new trial.

In the case at bar, near the very end of his rebuttal closing argument and just a few minutes before the jury retired to deliberate, the Assistant United States Attorney states:

> "You have to assume one thing or another for the moment, he's (the defendant's) either a narcotics addict or a narcotics pusher."

Since there was absolutely no evidence to support this wild statemant in a case wherein the Government had relied exclusively on two statutory presumptions to establish Williams' alleged guilt, counsel for appellant immediately moved for a mistrial (Tr.211). The District Court denied the motion and simply asked the jury "to disregard the assumption that counsel makes"(Tr.211).

Considering the nature of the proof against appellant (mere proof of presumptions based on possession), this was clearly prejudicial to Williams especially since the statement was made just before the jury retired to deliberate.

On this ground, we ask this Court, as a bare minimum on appeal, to grant Williams a new trial.

Point VI

26 U.S.C. 7237(d) Violates The Eigth Amendment In That It Arbitrarily Denies Suspension of Sentence, A Grant Of Probation Or Release On Parole Irrespective Of The Circumstances In Each Case.

After Williams' conviction in this case, the Information of Previous Convictions filed by the Government pursuant to 26 U.S.C. 7237(c)(2) showed that Williams had not been convicted of any violation of the narcotics laws since 1954. The record also showed that he is employed by Bonabond here in Washington, and that he was actively working with that agency to reduce and control narcotics traffic in the District of Columbia (Tr.238).

Yet, because of the provisions of 26 U.S.C. 7237, Judge Pratt had no alternative to sentence Williams for less than 10 years, or to suspend any part of that sentence, or to grant probation. And, of course, Section 7237 goes further and removes the applicability of Section 4202 of Title 18 and §24-201 of the D.C. Code, so parole prior to the end of the full 10 years sentence is impossible.

To the extent that narcotics use or addiction is an illness as well as a crime and to the extent Section 7237 escalates the punishment therefor to the point where a second or third offender's imprisonment cannot be reduced irrespective of the surrounding circumstances (i.e. the more ill or addicted a person may be, the more stringent and inflexible the punishment becomes), we submit Section 7237 is repugnant to the Eighth

Amendment in that it requires the imposition of cruel and unusual punishment.

Conclusion

Appellant's conviction under both the Harrison Narcotics Act and the Jones-Miller Act should be set aside and the indictment dismissed.

Respectfully submitted,

Edward L. Merrigan
Smathers, Merrigan & O'Keefe
Court-Appointed Counsel
For Appellant
1700 Pennsylvania Avenue, N.W
Washington, D.C. 20006

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For Appellant
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